No. 651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

MONTANA EASTERN PIPE LINE CO., a corporation,
Petitioner,

vs.

SHELL OIL COMPANY, FIDELITY GAS COMPANY, and MONTANA-DAKOTA UTILITIES COMPANY, corporations,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ARGUMENT

In a suit between petitioner and respondents' predecessors the Montana Supreme Court twenty-eight years ago determined that before the very operating agreements involved herein could be terminated a notice of default must first be served.

> "Before any right to cancel could arise or be exercised we think it was necessary that Wight, and possibly the permittees, give timely notice and call attention or show wherein Stokes or his assignees had failed to comply with such agreements."
>
> Atlantic-Pacific Oil Co. of Montana v. Gas Development Co., 105 Mont. 1, 26, 69 P. 2d 750, 759 (1937).

The only two notices claimed by petitioner to have been given are letters set forth in full in the district court's opinion, 216 F. Supp. 214, 219-20 (1963). Neither letter points out wherein any default exists, nor demands that the default be cured. The first letter is "to put you on notice that he [John Wight] and the companies with which he is connected ... assert a claim to rights ... and that preparations are being made to commence quiet title action." The second letter of June 26, 1957, states "I notice that apparently the Shell Oil Company is disregarding my previous letters and warnings and are ... developing same without any regard to what my rights may be."

The Hon. W. J. Jameson, Judge of the United States District Court for the District of Montana, concluded that these letters did not meet the notice requirements of *Atlantic-Pacific*.

> "It is clear that the defendants have not been served with a notice of default. Until such notice has been served, the final judgment and decree in the case of Atlantic-Pacific Oil Company v. Montana Eastern Pipe Line Company, et al., is res adjudicata and constitutes a bar to this action."
>
> Montana Eastern Pipe Line Company v. Shell Oil Company, 216 F. Supp. 214, 222 (1963).

Petitioner mistakenly construes Montana law as dispensing with notice and favoring forfeitures, and although a lessee, petitioner seeks treatment as though a favored lessor.

This Montana rule of notice is not confined to suits involving termination of operating agreements but also is applicable to suits by lessors for forfeiture of oil and gas leases for failure to develop.

> "While it is true that oil and gas leases in cases of ambiguity or uncertainty are generally construed in favor of the lessor and against the lessee and that it is the policy of the law to favor the forfeiture of oil and gas leases in order to prevent lands being burdened by profitless and unworked leases, see Abell

v. Bishop, 86 Mont. 478, 284 P. 525; McNamar Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 P. 166; Bowes v. Republic Oil Co., 78 Mont. 134, 252 P. 800, still 'One who seeks to enforce a forfeiture must himself be free from blame.' 37 C.J.S., Forfeitures, § 5 a, p. 11. The rule is clear that the lessor who intends to claim forfeiture, where development is an element, has the duty to demand that development proceed or commence."

> Fey v. The A. A. Oil Corporation, 129 Mont. 300, 316, 285 P. 2d 578, 586 (1955); and quoted with approval in Braun v. Mon-O-Co Oil Corporation, 133 Mont. 101, 111, 320 P. 2d 366, 371 (1958).

The petitioner herein as lessee of oil and gas leases issued by the United States of America sought in this action cancellation of the operating agreements executed in 1928 by its predecessors, the original oil and gas prospecting permittees. The legal relationship between a lessee and operator has been determined by the Montana Supreme Court in *Cedar Creek Oil & Gas Co. v. Archer,* 112 Mont. 477, 117 P. 2d 265 (1941). *Archer* was a suit for cancellation of an operating agreement as a cloud upon the lessee's leasehold title. The Supreme Court of Montana in *Archer* characterized the position existing between a lessee and an operator, wherein the lessee had reserved an overriding royalty of 7½ percent under the operating agreement, as follows:

> "In other words, the plaintiff is sitting in between the landowner and the operator and, in case of production, getting a nice 'rake-off' at small risk as compared with the costs and risks of the operator who drills the wells."

Ibid. at 483 and 268.

The Montana Supreme Court then denied the lessee any favored treatment and held that the usual strict rules against forfeiture are applicable.

> "It logically follows that, in our opinion, the trial

court was in error where, in its findings of fact, the plaintiff was given the status of a land owner lessor and as one entitled to the benefit of the exception to the general rule relating to forfeitures as applied in oil and gas leases in favor of the lessor, which is discussed at length in the case of Solberg v. Sunburst Oil & Gas Co., 76 Mont. 254, 246 P. 168, and a number of other cases decided by this court, in which the rule referred to was mentioned and applied. See Severson v. Barstow, 103 Mont. 526, 63 P. 2d 1022; Berthelote v. Loy Oil Co., 95 Mont. 434, 28 P. 2d 187; Abell v. Bishop, 86 Mont. 478, 284 P. 525; McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 P. 582."

Ibid. at 483 and 268.

"On the question of forfeiture, section 7408, Revised Codes, provides: 'A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.' See cases cited in note following the section in the Codes, in which cases both the rule and the exception are applied. We have followed the rule enjoined by this statute in our interpretation of the drilling agreement involved here, denying to the plaintiff the benefit of the exception to the rule for the reasons heretofore stated, but even without such rule we think plaintiff not entitled to forfeiture under a fair and reasonable construction of the drilling agreement."

Ibid. at 487 and 270.

CONCLUSION

Petitioner's imagined favored position is simply unknown in Montana law. None of the petitioner's cases cited from Montana, the United States Courts of Appeal, or this Court deals with the question of notice as a prerequisite to forfeiture. No Montana case supports its theory, and *Archer* cited by petitioner delivers the *coup de grace.* No cases from other circuits are in conflict; none can be, for the only legal question determined was of Montana law.

The United States District Court for the District of Montana determined and applied firmly established rules of Montana law. There is no reason for this Court to disregard either *Atlantic-Pacific* or *Archer*. There is no federal question involved in this case, and there is no special or important reason for granting the petition for certiorari. It should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. T. LAMB, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the day of November, 1965, I served copies of the foregoing Respondents' Brief in Opposition on the Petitioner herein by mailing copies in duly addressed envelopes with air mail postage prepaid to its respective attorneys of record as follows:

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